

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JOE REED,

Plaintiff,

vs.

JOE BRACKBILL, et al.,

Defendants.

3:07-CV-00149-BES (RAM)

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Brian E. Sandoval, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4.

Before the court is Plaintiff's Motion for a Temporary Restraining Order and/or Preliminary Injunction Pursuant to Fed. R. Civ. P. 65(A)(B) (Doc. #14). Defendants opposed the motion (Doc. #55) and Plaintiff replied in the form of a motion to strike Defendants' opposition (Doc. #21).

I. BACKGROUND

Plaintiff alleges that for one year he has been trying to get Defendants to correct the inadequate orthopedic boots they have forced upon him (Doc. #14 at 2). Plaintiff claims he cannot wear flat-soled shoes and the state boots do not have a high enough heel on them to relieve the pressure on Plaintiff's lower back (*Id.*). Plaintiff contends the boots he is currently forced to wear are inadequate in the following ways: 1) the outer soles are flat; 2) they don't have a high enough heel to help relieve the pressure of the build up on the left boot, which causes Plaintiff to put more pressure on his right foot when walking; and, 3) the build up is

1 uneven on the front and sides of the boots with a deep slope/incline (Doc. #14 at 3). Plaintiff
2 alleges he has already suffered irreparable harm and damage to his lower back at the hands
3 of Defendants and that he continues to suffer irreparable harm to his lower back by being
4 forced to wear the inadequate orthopedic boots (*Id.*).

5 Plaintiff's Second Amended Complaint (Doc. #11) includes the following causes of
6 action: 1) violation of Plaintiff's Eighth and Fourteenth Amendment rights against cruel and
7 unusual punishment (re: hemorrhoids); 2) violation of Plaintiff's Eighth and Fourteenth
8 Amendment rights and gross negligence (re: hepatitis C liver disease); and, 3) violation of
9 Plaintiff's Eighth and Fourteenth Amendment rights against cruel and unusual punishment
10 (re: forcing Plaintiff to kneel down and have his hands cuffed behind his back and his legs
11 restrained with ankle cuffs, then made to stand and walk to and from the shower and yard
12 for exercise time without his proscribed orthopedic boots) (*Id.* at 4-6).

13 II. LEGAL STANDARD

14 A fundamental principle of a preliminary injunction is the basic function to preserve
15 the status quo ante litem pending a determination of the action on the merits. *Larry P. v.*
16 *Riles*, 502 F.2d 963, 965 (9th Cir. 1974); *Washington Capitols Basketball Club, Inc. v. Barry*,
17 419 F.2d 472, 476 (9th Cir. 1969); *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804 (9th
18 Cir.) *cert. denied*, 375 U.S. 821 (1963). In the Ninth Circuit, the moving party must meet one
19 of two tests. "The traditional equitable criteria for granting preliminary injunctive relief are
20 (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to
21 plaintiff if the preliminary relief is not granted, (3) a balance of hardships favoring the
22 plaintiff, and (4) advancement of the public interest (in certain cases). Alternatively, in this
23 Circuit, the moving party may meet its burden by demonstrating either (1) a combination of
24 probable success on the merits and the possibility of irreparable injury or (2) that serious
25 questions are raised and the balance of hardships tips sharply in its favor. These [last two
26 criteria] are not separate tests, but the outer reaches 'of a single continuum.'" *Los Angeles*

1 *Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1200-1201 (9th
2 Cir. 1980) (internal citations omitted).

3 “The critical element ... is the relative hardship to the parties. If the balance of harm
4 tips decidedly toward the plaintiff, then the plaintiff need not show as robust a likelihood of
5 success on the merits as when the balance tips less decidedly. No chance of success at all,
6 however, will not suffice.” *Benda v. Grand Lodge of Intern. Ass’n of Machinists and*
7 *Aerospace Workers*, 584 F.2d 308, 315 (9th Cir. 1978). At an irreducible minimum, Plaintiff
8 must show that there is a fair chance of success on the merits. *Immigrant Assistance Project*
9 *of Los Angeles County Fed’n of Labor v. Immigration and Naturalization Serv.*, 306 F.3d
10 842, 873 (9th Cir. 2002); *see also Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1319 (9th Cir. 1994)
11 (quoting *Martin v. Int’l Olympic Comm.*, 740 F.2d 670, 674-75 (9th Cir. 1984)). On the other
12 hand, even if the harm factor favors the nonmoving party, a preliminary injunction may still
13 be granted if the moving party can show a strong likelihood of success on the merits.
14 *Immigrant Assistance Project*, 306 F.3d at 873.

15 For some requested preliminary injunctions, the moving party has an even heavier
16 burden. This heightened burden applies when the preliminary injunction would “(1) disturb
17 the status quo, (2) [is] mandatory as opposed to prohibitory, or (3) provide[s] the movant
18 substantially all the relief he may recover after a full trial on the merits.” *Kikumura v. Hurley*,
19 242 F.3d 950, 955 (9th Cir. 2001). Where the requested preliminary injunction alters the
20 status quo, the movant will ordinarily find it difficult to meet its heavy burden without
21 showing a likelihood of success on the merits. *Id.*

22 **III. DISCUSSION**

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24 Plaintiff requests a temporary restraining order and/or preliminary injunction
25 permanently enjoining Defendants from forcing Plaintiff to accept and wear inadequate
26 orthopedic boots (Doc. #14 at 1). Plaintiff asserts the inadequate boots have caused
27 irreparable harm and damage to Plaintiff’s hip and back (*Id.*). Plaintiff alleges that Defendants
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1 knew he was going to eventually have to accept the inadequate boots because his old
2 orthopedic boots were so worn out that they hurt Plaintiff's lower back (Doc. #14 at 3).
3 Plaintiff seeks an order from the district court directing NDOC and Bannister to issue a new
4 adequate pair of orthopedic boots with a buildup measuring two (2) inches and with thicker
5 soles and higher heels (*Id.* at 8). Plaintiff also requests the district court order Defendants
6 to take pictures of Plaintiff's old orthopedic boots and Plaintiff's current inadequate orthopedic
7 boots (*Id.* at 9). Finally, Plaintiff seeks an order directing Defendants to transfer Plaintiff out
8 of the care and custody of Defendants Brackbill, McDaniel, Endel and Brooks because Plaintiff
9 fears for his life and safety at the hands of these Defendants and questions their ability to
10 protect Plaintiff and treat his life-threatening illnesses (*Id.*).

11 Defendants argue that Plaintiff has not met his burden of showing he will suffer
12 irreparable injury because he was issued a new pair of orthopedic boots (Doc. #15 at 3).
13 Furthermore, Defendants argue that Plaintiff has failed to show he will likely prevail on the
14 merits because Plaintiff's claim regarding the issued orthopedic boots is simply a difference
15 of opinion between the parties and Defendants are attempting to treat Plaintiff's condition
16 (*Id.* at 4). Defendants also argues the following: 1) the balance of hardships does not tip in
17 Plaintiff's favor because a preliminary injunction will limit Defendants' ability to treat Plaintiff
18 and interfere with the decision-making of prison officials, which will harm Defendants more
19 than Plaintiff; 2) the issues do not involve the public interest; and, 3) Plaintiff's request goes
20 beyond maintaining the status quo (*Id.* at 5-6). Finally, Defendants assert Plaintiff cannot
21 claim that a general lack of exercise of due care creates a Fourteenth Amendment issue;
22 therefore, he will not likely prevail on the merits under the Due Process Clause (*Id.* at 5).

23 Plaintiff responds that defense counsel has failed to investigate the adequateness of
24 Plaintiff's medical treatment and has submitted a misleading pleading claiming Plaintiff has
25 been given a new pair of adequate orthopedic boots (Doc. #21 at 2). Plaintiff asserts that he
26 filed several grievances about being forced to accept the inadequate boots and Defendants
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1 refused to correct his boots (Doc. #21 at 2). Plaintiff alleges Defendants have conspired and
2 acted deliberately indifferent to his serious medical condition by failing to correct the
3 inadequate boots, failing to treat Plaintiff's hemorrhoid and failing to treat Plaintiff's lower
4 back pain over a four-year period (*Id.* at 2-3). Plaintiff further responds that his claim is not
5 simply a difference of opinion between the parties because Defendants denied to correct their
6 deliberate indifference by stating Plaintiff is not eligible to have the measurement on the
7 current boots corrected and is not eligible for a new pair of orthopedic boots (*Id.* at 3). Finally,
8 Plaintiff responds that, given the issue and arguments involved, it is in the public interest for
9 this court to strike Defendants' opposition and grant Plaintiff's motion ordering Defendants
10 to correct the inadequateness of the new orthopedic boot buildup and transfer Plaintiff to a
11 new prison out of the care of Defendants (*Id.* at 4).

12 Plaintiff requests the court order an emergency telephone conference call on the instant
13 motion asserting that, after seeing the inadequacy of Plaintiff's boots, Dr. Mar refused to have
14 the boots corrected stating "they could not spend any more money [and] that Plaintiff is just
15 going to have to wear those inadequate boot[s] [and] Plaintiff could have only a pair of doctor
16 sole's shoes insert ..." (Doc. #16 at 3). Plaintiff also asserts Dr. Mar refused to allow Plaintiff
17 to receive surgery on his "grape like size hemorrhoid" and Dr. Mar "willingly and
18 unconstitutionally started to yank on Plaintiff[s] hemorrhoid" because Dr. Mar was mad at
19 Plaintiff over the inadequate orthopedic boots (*Id.*).

20 **1. Mandatory vs. Prohibitory Injunctions**

21 A prohibitory preliminary injunction preserves the status quo, while a mandatory
22 injunction "goes well beyond simply maintaining the status quo *pendente lite* [and] is
23 particularly disfavored." *Anderson*, 612 F.2d at 1114 (*quoting Martinez v. Mathews*, 544 F.2d
24 1233, 1243 (5th Cir. 1976)). When a mandatory preliminary injunction is requested, the
25 district court should deny such relief unless the facts and law clearly favor the moving party.
26 *Id.*; *Stanley v. Univ. of Southern California*, 13 F.3d 1313, 1320 (9th Cir. 1994). "[C]ourts are
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more reluctant to grant a mandatory injunction than a prohibitory one and ... generally an injunction will not lie except in prohibitory form. Such mandatory injunctions, however, are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages.” *Anderson*, 612 F.2d at 1115 (citing *Clune v. Publishers’ Assn. of New York City*, 214 F.Supp. 520 (S.D.N.Y. 1963), *aff’d per curiam*, 314 F.2d 343 (2d Cir. 1963)).

This injunction, if granted, requires affirmative conduct on the part of Defendants, in that they must provide Plaintiff with new orthopedic boots and possibly transfer Plaintiff to a new prison out of the care of Defendants. Accordingly, Plaintiff’s motion for such “mandatory preliminary relief” is subject to heightened scrutiny and should not issue unless the facts and law clearly favor Plaintiff. *Anderson*, 612 F.2d at 1114; *see also Dahl v. HEM Pharmaceuticals Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993).

2. Probable Success on the Merits and Possibility of Irreparable Injury

Plaintiff’s Complaint alleges violations of Plaintiff’s Eighth and Fourteenth Amendment rights based on Defendants’ alleged denial of proper medical treatment (Doc. #11). Plaintiff’s status determines the appropriate standard for evaluating his conditions of confinement. The Eighth Amendment applies to “convicted prisoners.” *See Whitley v. Albers*, 475 U.S. 312, 318-319 (1986); *Bell v. Wolfish*, 441 U.S. 520, 536 n.16 (1979); *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986). The more protective Fourteenth Amendment standard applies to conditions of confinement when detainees have not been convicted. *See Bell*, 441 U.S. at 535-537; *see also Gary H. v. Hegsrtom*, 831 F.2d 1430 (9th Cir. 1987). Here, Plaintiff has been convicted; therefore, the Eighth Amendment standard applies to Plaintiff’s claims.

A. Deliberate Indifference Standard

Under the Eighth Amendment, where inmates challenge prison conditions, the Supreme Court has applied a “deliberate indifference” standard. In *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), the Supreme Court determined that deliberate indifference to a prisoner’s

1 serious medical needs constitutes the “unnecessary and wanton infliction of pain” proscribed
2 by the Eighth Amendment. “This is true whether the indifference is manifested by prison
3 doctors in their response to the prisoner’s needs or by prison guards in intentionally denying
4 or delaying access to medical care or intentionally interfering with the treatment once
5 proscribed.” *Estelle*, 429 U.S. at 104-105. Deliberate indifference to a prisoner’s serious illness
6 or injury states a cause of action under §1983. *Id.* at 105.

7 Deliberate indifference is a high legal standard. *Toguchi v. Chung*, 391 F.3d 1051, 1060
8 (9th Cir. 2004). A showing of medical malpractice or negligence is insufficient to establish
9 a violation under the Eighth Amendment. *Id.* Instead, Plaintiff must meet two requirements
10 in order to show Defendants acted deliberately indifferent to his serious medical needs. First,
11 Plaintiff must show, as an objective matter, that Defendants’ actions rise to the level of a
12 “sufficiently serious” deprivation. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *see also*,
13 *Rhodes v. Chapman*, 452 U.S. 337, 345-346 (1981); *Wilson v. Seiter*, 501 U.S. 294, 298 (1991).
14 Second, as a subjective matter, Plaintiff must show Defendants had a “sufficiently culpable
15 state of mind.” *Farmer*, 511 U.S. at 834. In other words, Plaintiff must show Defendants knew
16 he faced a substantial risk of harm and disregarded that risk by failing to take reasonable
17 measures to abate it either by their actions or inactions. *Id.* at 837. Plaintiff need not show
18 Defendants acted or failed to act believing that harm actually would befall him; it is enough
19 that Defendants acted or failed to act despite having knowledge of a substantial risk of serious
20 harm. *Farmer*, 511 U.S. at 842.

21 In seeking injunctive relief, the subjective factor should be determined in light of
22 Defendants’ current attitudes and conduct, their attitudes and conduct at the time this suit
23 was brought and their attitudes persisting thereafter. *Id.* at 845. To establish eligibility for
24 an injunction, Plaintiff must demonstrate the continuance of Defendants’ knowing and
25 unreasonable disregard of an objectively intolerable risk of harm during the remainder of this
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1 litigation and into the future. *Farmer*, 511 U.S. at 846. If the court finds the Eighth
2 Amendment's subjective and objective requirements satisfied, appropriate injunctive relief
3 may be granted. *Id.*

4 B. Probable Success on the Merits

5 a. *Objective Component – Sufficiently Serious Deprivation*

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7 First, Plaintiff must show a sufficiently serious deprivation by showing Defendants'
8 alleged actions or inactions involve the "unnecessary and wanton" infliction of pain, which
9 includes inflictions of pain that are "totally without penological justification." *Rhodes*, 452
10 U.S. at 346 (internal citations omitted). The Ninth Circuit has found "[a] 'serious' medical
11 need exists if the failure to treat a prisoner's condition could result in further significant injury
12 or the 'unnecessary and wanton infliction of pain.' The 'routine discomfort' that results from
13 incarceration and which is 'part of the penalty that criminal offenders pay for their offenses
14 against society' does not constitute a 'serious' medical need." *Doty v. County of Lassen*, 37
15 F.3d 540, 546 (9th Cir. 1994) (internal citations omitted). "In examining medical conditions
16 separate from the 'routine discomfort' of incarceration, indicia of a 'serious' medical need
17 include (1) the existence of an injury that a reasonable doctor would find important and
18 worthy of comment of treatment, (2) the presence of a medical condition that significantly
19 affects an individual's daily activities, and (3) the existence of chronic or substantial pain."
20 *Id.* at 546, n.3.

21 Here, Plaintiff asserts Defendants are forcing him to wear an orthopedic boot that is
22 substandard and causing foot problems (Doc. #11 at 20). Namely, Plaintiff asserts his new
23 orthopedic boots are inadequate and hurt his lower back and cause blisters due to an uneven
24 buildup on the left boot (Doc. #14 at 2). The record indicates Plaintiff has refused to accept
25 two (2) pairs of boots. Initially, Plaintiff requested a new pair of orthopedic boots because
26 his old boots were worn out (Doc. #11 at 20). Then, after Defendants offered Plaintiff a new
27 pair of orthopedic boots, Plaintiff claimed they were inadequate and wanted his old pair of
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1 orthopedic boots returned back to him at once (Doc. #11 at 34). Apparently, Plaintiff
2 requested special boots ordered from an outside vendor, which would put lifts on the boots
3 for his medical condition because the state boots were allegedly too flat (*Id.* at 20).
4 Defendants refused and informed Plaintiff they do not use outside vendors (*Id.*). It appears
5 Bannister informed Plaintiff that his state boots could be altered to meet his needs (*Id.* at 20)
6 and the record indicates Plaintiff's state boots were, in fact, altered; however, Plaintiff found
7 the altered state boots inadequate (*Id.* at 22 ("I can't wear state boot and you had these
8 orthopedic boots made out of state boots trying to save the State of Nevada Dept. of Correction
9 money by taking a short cut to provide me with a pair of orthopedic boots by using state
10 boot.")).

11 No reasonable doctor found the existence of an injury important or worthy of comment
12 to opine Plaintiff cannot wear state boots or altered state boots (*Id.* at 22). Plaintiff's mere
13 assertion that he cannot wear state boots, even if altered into orthopedic boots, is simply a
14 difference of medical opinion. In fact, Plaintiff's Complaint does not allege that Defendants
15 refused to provide Plaintiff with prescribed orthopedic boots; instead, Plaintiff's Complaint
16 ultimately alleges Defendants refused to provide Plaintiff with a pair of "adequate" orthopedic
17 boots that meet Plaintiff's satisfaction. Therefore, at best, Plaintiff's Complaint alleges a
18 difference in medical judgment. Furthermore, there is no indication in the record that
19 Plaintiff's new orthopedic boots significantly affect Plaintiff's daily activities and, while
20 Plaintiff complains of low back pain and blisters caused by the new boots, Plaintiff was advised
21 by medical authorities to wear the boots a little at a time in order to break them in (*Id.* at 25).
22 Plaintiff disagrees with this treatment. "While it is clear that a refusal to permit medical
23 treatment may, in certain circumstances, be actionable under the Civil Rights Act, a difference
24 of opinion between a prisoner patient and prison medical authorities as to what treatment
25 is proper and necessary does not give rise to a claim under the Act." *Mayfield v. Craven*, 433
26 F.2d 873, 874 (9th Cir. 1970) (internal citations omitted).

1 Under these facts, Plaintiff has failed to establish Defendants' conduct is incompatible
2 with the "evolving standards of decency that mark progress of a maturing society" or that
3 Defendants' conduct constitutes the "unnecessary and wanton infliction of pain." *Estelle*, 429
4 U.S. at 102-103 (citations omitted). Furthermore, Plaintiff has failed to show that Defendants'
5 issuance of a new pair of orthopedic boots made out of state boots, which Plaintiff finds
6 inadequate, is sufficiently serious enough to meet the objective component necessary to
7 establish a constitutional violation. *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) ("The objective
8 component of an Eighth Amendment claim is therefore contextual and responsive to
9 contemporary standards of decency....extreme deprivations are required to make out a
10 conditions-of-confinement claim. Because routine discomfort is part of the penalty that
11 criminal offenders pay for their offenses against society, only those deprivations denying the
12 minimal civilized measure of life's necessities are sufficiently grave to form the basis of an
13 Eighth Amendment violation. A similar analysis applies to medical needs. Because society
14 does not expect that prisoners will have unqualified access to health care, deliberate
15 indifference to medical needs amounts to an Eighth Amendment violation only if those needs
16 are serious" *Id.* at 8-9 (internal quotations and citations omitted)).

17 b. *Subjective Component – Knowledge of Substantial Risk of Harm*

18 Where Plaintiff has failed to meet the objective component of establishing a deprivation
19 sufficiently serious under Eighth Amendment standards, the court need not consider the
20 subjective component. *See Rhodes v. Chapman*, 452 U.S. 337 (1981) (Supreme Court noted
21 its decision turned on the objective component of the Eighth Amendment claim and did not
22 consider the subjective component); *see also, McKinney v. Anderson*, 959 F.2d 853 (9th Cir.
23 1992).

24 This Report and Recommendation turns on the objective component; therefore, the
25 court need not consider Defendants' knowledge of a substantial risk of harm to Plaintiff.
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1 C. Irreparable Injury

2 Plaintiff has failed to show he will possibly suffer irreparable injury where he has not
3 shown a sufficiently serious injury to establish a constitutional violation.

4 **3. Serious Questions Raised and Balance of Hardships**

5 Plaintiff asserts the instant motion and Complaint raise serious questions and the
6 balance of hardships tips sharply in his favor (Doc. #14 at 8). However, as previously
7 discussed, the critical element is the relative hardship to the parties and, under the continuum
8 or sliding scale articulated in *Benda*, at an irreducible minimum, Plaintiff must show that
9 there is a fair chance of success on the merits. 584 F.2d at 315. No chance of success at all will
10 not suffice. *Id.* Furthermore, Plaintiff requests mandatory injunctive relief and, therefore,
11 carries an even heavier burden of showing a likelihood of success on the merits. *Kikumura*,
12 242 F.3d at 955.

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14 Plaintiff has failed to meet his heavy burden. Even if the balance of hardships tipped
15 decidedly in Plaintiff's favor, he was required to at least make a minimal showing of success
16 on the merits. He has not done so. No chance of success on the merits on Plaintiff's Eighth
17 Amendment claim regarding his orthopedic boots, regardless of the balance of hardships
18 possibly tipping in Plaintiff's favor, prevents the court from issuing a temporary restraining
19 order or a preliminary injunction.

20 **IV. CONCLUSION**

21 Plaintiff has not met the requirements necessary in order for the district court to grant
22 a temporary restraining order or preliminary injunction. Plaintiff has failed to show a
23 likelihood of success on the merits and, as required in order to issue a mandatory injunction,
24 Plaintiff has failed to show the facts and law clearly favor him. Furthermore, Plaintiff has
25 failed to show, at an irreducible minimum, even a fair chance of success on the merits where
26 he has not shown Defendants acted with deliberate indifference to his serious medical needs
27 by providing him with a new pair of orthopedic boots that medical authorities find adequate,
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1 although Plaintiff disagrees. Finally, any relative hardship to Plaintiff does not overcome the
2 fact that no chance of success on the merits will not suffice for an Eighth Amendment claim.

3 Accordingly, the district court should deny Plaintiff's request for a temporary
4 restraining order and/or preliminary injunction ordering Defendants to issue Plaintiff a new
5 pair of "adequate" orthopedic boots, to take pictures of Plaintiff's old and current orthopedic
6 boots, and to transfer Plaintiff out of the custody of Defendants. Additionally, as the facts do
7 not warrant it, the district court should deny Plaintiff's request for an emergency telephone
8 conference call on the instant motion.

9 **RECOMMENDATION**

10 **IT IS THEREFORE RECOMMENDED** that the District Judge enter an order
11 **DENYING** Plaintiff's Motion for a Temporary Restraining Order and/or Preliminary
12 Injunction Pursuant to Fed. R. Civ. P. 65(A)(B) (Doc. #14).

13 The parties should be aware of the following:

14 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the
15 Local Rules of Practice, specific written objections to this Report and Recommendation within
16 ten (10) days of receipt. These objections should be titled "Objections to Magistrate Judge's
17 Report and Recommendation" and should be accompanied by points and authorities for
18 consideration by the District Court.

19 2. That this Report and Recommendation is not an appealable order and that any
20 notice of appeal pursuant to Rule 4(a)(1), Fed. R. Civ. P., should not be filed until entry of the
21 District Court's judgment.

22 DATED: November 15, 2007.



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UNITED STATES MAGISTRATE JUDGE
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